Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–47 OF 1997

GOPAL SRI RAM, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA

10 JULY 2000

Labour Law *— Employment — Dismissal — Without just cause or excuse — Assessment of damages — Award of backwages without taking into consideration respondent's new employment — Award in lieu of reinstatement at discretion of court — Whether award made was justified*

The respondent was employed by the appellant as its general manager. He commenced his employment on 1 November 1984. His salary was RM8,000 per month. In June 1986, the appellant terminated the respondent's service on the ground of misconduct. The Industrial Court held that the respondent had been dismissed without just cause or excuse. The respondent was awarded arrears of salary from the date of dismissal, ie 1 June 1984 until the last date of hearing, ie 11 October 1995. The Industrial Court also awarded the respondent compensation in lieu of reinstatement, ie a month's salary for each year of service from 1 November 1984 until 11 October 1995. It was common ground that in August 1988 the respondent found himself other employment but no adjustment was made by the Industrial Court to the award of backwages. The appellant applied for an order of certiorari which was dismissed by the High Court. The appellant appealed.

Held:

(1) The charges of misconduct were all groundless. The appellant had acted without just cause or excuse when it terminated the respondent's contract of employment. Based on well-settled principles, it was abundantly clear that the Industrial Court did not commit any error of law when it held that the respondent had been dismissed without just cause or excuse. It did not therefore exceed its jurisdiction (see p 91A, G–H).

(2) An adjustment should be made to an award of backwages where the workman has found other employment. The Industrial Court had proceeded as though the respondent had not been employed elsewhere during the whole period in question. The award in respect of backwages was therefore flawed. It was not an award that a reasonable tribunal would have arrived at having regard to the principles of law that govern the position. The court would therefore quash the award of backwages. A fresh award of backwages must be made, taking into account the fact that the respondent had found other employment (see p 94E–G).

(3) The assessment for the award for compensation in lieu of an order of reinstatement is highly subjective and discretionary. So long as the award is not that makes one look upon it askance, it must be upheld. The principles that are to be applied to such an award should be more or less the same as those governing an award of damages for personal injury. The court found that the award of a month's salary for each year of service from 1 November 1984 until 11 October 1995 was not disproportionate or unreasonable. The court disagreed that the cut-off date should be August 1988 as contended by the appellant. The additional sum must be taken as representing the vicissitudes such as the disadvantaged position in which the respondent must have found himself in consequence of the dismissal (see pp 94H–95A, 95E-F).

[Bahasa Malaysia summary

Responden telah digaji oleh perayu sebagai pengurus besarnya. Beliau telah memulakan pekerjaannya pada 1 November 1984. Gajinya adalah RM8,000 sebulan. Pada Jun 1986, perayu telah menamatkan perkhidmatan responden atas alasan salah laku. Mahkamah Perusahaan memutuskan bahawa responden dipecat tanpa alasan atau sebab yang adil. Responden telah diawardkan dengan gaji tunggakan dari tarikh pemecatannya, iaitu 1 Jun 1984 sehingga tarikh perbicaraan terakhir, iaitu 11 Oktober 1995. Mahkamah Perusahaan telah mengawardkan responden pampasan sebagai menggantikan pengembalian semula kerja, iaitu sebulan gaji untuk setiap tahun perkhidmatan dari 1 November 1984 sehingga 11 Oktober 1995. Tidak dipertikaikan bahawa pada bulan Ogos 1988 responden telah mendapatkan penggajian yang lain tetapi tiada pengubahsuaian telah dibuat oleh Mahkamah Perusahaan kepada award gaji tunggakan. Perayu telah memohon untuk perintah certiorari yang telah ditolak oleh Mahkamah Tinggi. Perayu telah merayu.

Diputuskan:

(1) Pertuduhan-pertuduan salah laku adalah tidak berasas. Perayu telah bertindak tanpa alasan dan sebab yang adil apabila ia menamatkan kontrak perkhidmatan responden. Berdasarkan prinsip-prinsip yang kukuh, adalah sangat jelas bahawa Mahkamah Perusahaan tidak melakukan kesilapan undang-undang apabila ia memutuskan bahawa responden telah dipecat tanpa sebab dan alasan yang adil. Ia tidak melampaui bidang kuasanya (lihat ms 91A, G–H).

(2) Suatu pengubahsuaian sepatutnya dibuat kepada award tunggakan di mana pekerja tersebut telah mencari pekerjaan yang lain. Mahkamah Perusahaan telah bertindak seolah-olah responden tidak digaji di tempat lain di dalam keseluruhan tempoh yang dipersoalkan. Award berkenaan dengan tunggakan

gaji yang lama adalah cacat. Ia bukanlah suatu award yang akan dicapai oleh suatu tribunal yang munasabah yang mempertimbangkan prinsip-prinsip undang-undang yang meliputi kedudukan tersebut. Dengan itu, mahkamah akan membatalkan award tunggakan gaji tersebut. Suatu award tunggakan gaji yang baru mestilah dibuat, dengan mengambil kira fakta bahawa responden telah mendapat pekerjaan yang lain (lihat ms 94E–G).

(3) Penaksiran untuk award pampasan sebagai menggantikan perintah untuk pengembalian semula kerja adalah sangat subjektif dan mengikut budi bicara. Selagi award tersebut tidak menjadikan seseorang ragu-ragu, ia mestilah disahkan. Prinsip-prinsip yang terpakai kepada award sedemikian mestilah lebih kurang sama dengan award ganti rugi yang meliputi kecederaan peribadi. Mahkamah mendapati bahawa award sebulan gaji untuk setiap tahun perkhidmatan dari 1 November 1984 sehingga 11 Oktober 1995 bukanlah tidak bersekadar atau tidak munasabah. Mahkamah tidak bersetuju bahawa tarikh sekatan sepatutnya pada bulan Ogos 1988 seperti yang ditegaskan oleh perayu. Jumlah yang selebihnya mestilah dilihat sebagai mewakili perubahan memudaratkan seperti kedudukan yang merugikan di mana responden mendapati dirinya akibat pemecatan tersebut (lihat ms 94H–A, 95E–F).]

Notes

For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 723–730.

Cases referred to

Ahmed Abdul Rahman v SPK-Sentosa Corp Bhd & Anor [1998] 4 MLJ 311 (refd)

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (refd)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Kannan & Anor v Menteri Buruh & Tenaga Rakyat & Ors [1974] 1 MLJ 90 (refd)

L Michael & Anor v M/s Johnson Pumps India Ltd [1975] 1 LLJ 262 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Page v Hull University Visitor [1993] AC 682 (refd)

Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd) A

South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors [1980] 2 MLJ 165 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd) B

Legislation referred to

Industrial Relations Act 1967 s 20(1)

Appeal from: Originating Motion No R2–25–108 of 1996 (High Court, Kuala Lumpur) C

N Sivabalah (*Shearn Delamore & Co*) for the appellant.
KP Gengdharan (*Genga Maha Wong & Co*) for the first respondent.

Gopal Sri Ram JCA: This appeal raises two questions. Neither of them gives rise to any difficulty. They are matters upon which our courts have D made several pronouncements. The first question is whether the Industrial Court had exceeded its jurisdiction in holding that the respondent had been dismissed without just cause or excuse. The second is whether the compensation awarded by the Industrial Court to the respondent is excessive. Both were tested in certiorari proceedings before the High Court and were resolved against the appellant. The factual background from E which these questions arise may be shortly stated.

The respondent was at all material times the appellant's general manager in Sabah. He commenced his employment on 1 November 1984. His salary was RM8,000 per month. On 15 May 1986, the appellant served him with a letter setting out three charges of misconduct. The first charge F related to three instances where the respondent had allegedly overstepped the bounds of his authority. The second and third charges alleged that the respondent had abused his authority. The respondent gave a written answer to the charges formulated against him. But the appellant's board rejected his explanation. It terminated his services. The respondent challenged the termination. He made representations under s 20(1) of the Industrial G Relations Act 1967. The Minister referred those representations to the Industrial Court. He made the reference on 19 January 1988. Thereafter, the Industrial Court proceeded with the hearing of the case. It found for the respondent. It held that he had been dismissed without just cause or excuse. But it refused to reinstate him. It awarded him monetary compensation instead. H

The Industrial Court's award was attacked in certiorari proceedings before the High Court. The case was thoroughly argued. All points that could possibly be taken were taken. But the judge was not impressed. He declined certiorari. The appellant has appealed against his refusal.

Before us, counsel for the appellant conceded that the second and third I charges were not serious enough to warrant dismissal. He said that he was not pursuing them. In respect of the first charge, he accepted that there was

A strong evidence of condonation by the appellant's board of what the respondent had done.

So it comes to this. The charges of misconduct were all groundless. The appellant had acted without just cause or excuse when it terminated the respondent's contract of employment. In industrial law, it does not matter what you call it — termination or dismissal — it is all the same. At the end of the day it is for the Industrial Court to determine whether there has been a dismissal and whether that dismissal was with just cause or excuse. That is what was held by the Federal Court in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129. There is a passage in the judgment of Raja Azlan Shah CJ (Malaya) (as he then was) in that case which has been applied in several subsequent cases. It is at p 136 of the report. And it reads as follows:

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

The point received further emphasis in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 176, where the Federal Court applied with approval the following dictum in the judgment of the Indian Supreme Court in *L Michael & Anor v M/s Johnson Pumps India Ltd* [1975] 1 LLJ 262 at p 268:

> The tribunal has the power and, indeed the duty to x-ray the [termination] order and discover its true nature, if the object and effect, if the attendant circumstances and the *ulterior purpose* to dismiss the employee because he is an evil to be eliminated. But if the management, to cover up the inability to establish by an enquiry, illegitimately but ingeniously passes an innocent-looking order of termination simpliciter, such action is bad and is liable to be set aside.

Based on these well-settled principles, it is abundantly clear that the Industrial Court did not commit any error of law when it held that the respondent had been dismissed without just cause or excuse. It did not therefore exceed its jurisdiction.

The appellant also complains about the quantum of compensation awarded. So we must see what the Industrial Court did.

First, it awarded the respondent arrears of salary from the date of dismissal, ie, from 1 June 1986 until the last date of hearing of the case, ie, 11 October 1995. From this sum it ordered a deduction of the respondent's contribution to the Employees Provident Fund. Next, it awarded the

respondent compensation in lieu of reinstatement. The multiplier was of one month's salary for each year of service. The multiplicand was the period 1 November 1984 until 11 October 1995. Lastly, it awarded the respondent twenty days' wages in lieu of his unutilized leave. The total sum awarded by the Industrial Court works out to an amount in excess of RM1m.

The first question which, I think, we ought to address is whether the High Court has jurisdiction in certiorari proceedings to interfere with the quantum of compensation. The respondent has argued against the question. In other words, he says that there is no jurisdiction. He relies on *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304. In that case, Chang Min Tat FJ, said (at p 314):

> As for the award of compensation, even assuming that the award contains one or more errors upon its face, the error or errors did not give the High Court jurisdiction to quash the decision of the Industrial Court. It is in this realization of the proper law in the matter, as we understand him, that Mr Peddie has not made the slightest attempt to address us on the quantum.

This statement was entirely influenced by the decision in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165. That case upheld the view that in the context of a statutory ouster there was a distinction between errors of law that go to jurisdiction and those that do not. In earlier cases, our courts had held that the decision of a public decision-maker could be quashed if it was not in accordance with law. See *Kannan & Anor v Menteri Buruh & Tenaga Rakyat & Ors* [1974] 1 MLJ 90. But the Privy Council either disapproved of or overruled those cases. That was because the Judicial Committee did not fully appreciate the impact of the speeches in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, a case that forever changed the face of administrative law. It did away with the distinction between errors of law that go to jurisdiction and errors of law that do not. In England the point was put beyond argument in *Page v Hull University Visitor* [1993] AC 682.

The *Fire Bricks* case worked its will for many years in our jurisprudence. It prevented intervention in cases where there was a patent error of law which was classified as non-jurisdictional. It occasioned much hardship. But we finally managed to jettison it in this court. It was in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317. Later, that decision was upheld by the Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369. Very recently, a differently constituted bench of the Federal Court came to the same conclusion, although it did so without the benefit of the views in these cases. See *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. There, Edgar Joseph Jr FCJ, said (at p 45):

> Accordingly, we hold that Lord Denning's view in *Pearlman* is to be preferred to that of the Privy Council in the *Fire Brick*'s case, which should no longer be considered good law. To hold otherwise would mean, as Professor Jain has pointed out, that a tribunal could misinterpret the law without worrying about

A interference and the tribunal would become the final judge of the law, thereby — in the words of Lord Diplock quoted above — violating the constitutional principle that it is the High Court which determines the meaning of legislation and not any other entity.

In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be B challenged, etc' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* at p 70, '... no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.'

C It follows that the passage in *Dr Dutt*'s case relied upon by the respondent no longer represents the law. Accordingly, it is open to the High Court in certiorari proceedings to determine whether the compensation awarded by the Industrial Court is in accordance with law. If it is not, then I see no reason why an award of compensation may not to be quashed. Whether the D High Court ought to interfere with an award of compensation in any given case would, of course, depend on the facts of the particular case. The decision of this court in *Ahmed Abdul Rahman v SPK-Sentosa Corp Bhd & Anor* [1998] 4 MLJ 311 provides a useful illustration of a case where an award of compensation was corrected.

E Mr Sivabalah, counsel for the appellant has submitted that the grounds on which an award of compensation may be reviewed are the same as those on which any decision of a public decision-maker may be challenged. That submission is, I think, correct.

Now, the grounds of public law challenged are as set out in the judgment of Edgar Joseph Jr FCJ, in *R Rama Chandran v The Industrial* F *Court of Malaysia & Anor* [1997] 1 MLJ 145. I do not propose to repeat in full what was there said. To summarize, there are at least four reasons why the decision of a public decision-maker may be void. It may be contrary to law. Or it may be procedurally flawed. Or it may be unreasonable in the *Wednesbury* sense. Or it may be disproportionate.

G That brings me to the question whether the award of compensation is flawed in the present instance. To answer that question you have to bear in mind the principles that govern the award of compensation in a case of dismissal without just cause and excuse. In industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, where the relationship H between the parties has broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work. In such a case, the Industrial Court may award monetary compensation. Such an award is usually in two parts. First, there is the usual award for the arrears of wages, or backwages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed I because of the unjustified act of dismissal. Second, there is an award of compensation in lieu of reinstatement. I will say more about this in a moment. Let me deal with the award of backwages first.

The principles that govern an award of backwages are conveniently summarized in *The Law of Industrial Disputes* (4th Ed) Vol 2 by Malhotra. It is a leading textbook on the subject. It is highly regarded by our courts. There is a useful passage at p 961. It reads as follows:

> In dealing with different types of cases, the tribunal in each case has to see that relief should be given in a particular case to a particular workman in the matter of compensation by balancing the conflicting claims and the variations that exist in human conduct and the requirements of social justice. On the parity of reasoning, the adjudicator has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of unemployment with him, with the claim of the workman that he was not employed anywhere at all. The quantum of back-wages is, therefore, a matter in the discretion of the tribunal dependent on the facts of a case. The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. The discretion is also to be exercised having regard to certain approved principles and procedures. A workman directed under an award to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere, because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers.

What comes across quite clearly is that an adjustment should be made to an award of backwages where the workman has found other employment. The appellant has complained that no such adjustment was made by the Industrial Court in the present instance. I think that the complaint is justified. It is common ground that in August 1988, the respondent found himself other employment in Peninsula Malaysia. Yet the Industrial Court did not take that into account when awarding the respondent his backwages. It proceeded as though the respondent had not been employed elsewhere during the whole of the period in question. The award in respect of backwages is therefore flawed. It is not an award that a reasonable tribunal would have arrived at having regard to the principles of law that govern the position. I would therefore quash the award of backwages. A fresh award of backwages must be made, taking into account the fact that the respondent has found other employment. We may, of course, do it ourselves. But I do not think that we are armed with sufficient facts for us to make the adjustment ourselves in the present case. I would therefore order that the matter be remitted to the Industrial Court for a fresh assessment to be made.

I now turn to the award for compensation in lieu of an order of reinstatement. Now, there are many imponderables that influence the making of such an award. They are too numerous for me to mention. They include such matters as the stigma which an act of dismissal carries with it. There is also the drawback that the workman if and when he finds alternative employment may have to start from a lower rung. The

A assessment is highly subjective and discretionary. So long as the award is not one that makes one look upon it askance, it must be upheld. The principles that are to be applied to such an award should, in my judgment, be more or less the same as those governing an award of damages for personal injury. They were summarized by Hashim Yeop A Sani FJ (as he then was) in *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 at p 155 as follows:

B

> It has however long been settled that where a trial judge has erred in the 'direction of being too generous' that would not by itself constitute a matter to be appealed from (*Pahang Lim Siong Motor Co & Anor v Cheong Swee Khai & Anor* [1962] MLJ 29). In *United Plywood & Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 Gill FJ (as he then was) explained the principle clearly when he said:
>
> C
>
> > 'The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim, 'Good gracious, is that the sum which has been awarded — that sum must be altered', or it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.'
>
> D
>
> In such assessment there is generally ample room for individual choice to arrive at a fair and reasonable figure and the appellate court is always slow to reverse the trial Judge's decision on such assessment unless there are strong grounds for interference.

E In the present instance, the Industrial Court has, as I earlier observed, awarded a month's salary for each year of service from 1 November 1984 until 11 October 1995. Counsel for the appellant says that there is a serious error here because the cut-off date should be August 1988. With respect, I am unable to agree. The additional sum must, I think be taken as representing those vicissitudes to which I earlier referred, such as the F disadvantaged position in which the respondent must have found himself in consequence of the dismissal. It may be a little generous. But I am unable to say that it is either disproportionate or unreasonable. This part of the award should not therefore be disturbed.

In the result, I would allow the appeal to the very limited extent I have G earlier indicated. The award of backwages is quashed. The matter is remitted to the Industrial Court for assessment of the backwages, taking into account the fact of the respondent having found other employment in 1988. Since the appellant has succeeded only on a very small part of the appeal, I would order that each party do bear its own costs of the appeal. The order as to costs in the court below will stand undisturbed.

H My learned brothers Ahmad Fairuz and Mokhtar Sidin JJCA, have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Order accordingly.

I Reported by Jafisah Jaafar